

Memorandum 2007-44

Revision of No Contest Clause Statute (Discussion of Issues)

At the August meeting, the Commission considered comments on its tentative recommendation on *Revision of the No Contest Clause Statute* (April 2007).

In response to the comments, the Commission decided to make a number of changes to the proposed law. Some of those changes were fairly straightforward and will be implemented in drafting the final recommendation.

However, two of the decisions were stated generally, with the expectation that the staff would conduct additional analysis and bring back draft language for Commission review:

- The proposed law should allow the enforcement of a no contest clause in response to a creditor claim or property ownership dispute, to the extent that the clause provides for such enforcement. The no contest clause would operate as a “forced election,” requiring a beneficiary to choose between taking the gift offered under the estate plan or asserting a creditor or property ownership claim. The beneficiary could not do both.
- The standard for establishing “probable cause” to bring a contest should be revised to more closely parallel the standard provided in existing Probate Code Section 21306(b). The goal would be to craft a standard that requires more than a mere possibility of prevailing, but less than a likelihood that prevailing is “more probable than not.”

See Minutes (August 2007), pp. 7-8. This memorandum discusses how those decisions could be implemented. Once those matters are settled, the staff will prepare a draft recommendation for approval at a future meeting.

The Commission received two new letters commenting on the no contest clause study. They are attached as an Exhibit. The first is from Charles Collier. He writes in support of deleting the declaratory relief provisions. See Exhibit p. 1. The second is from Neil Horton, writing on behalf of the Executive Committee of the Trusts and Estates Section of the State Bar (TEXCOM). He describes the

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

TEXCOM reaction to some draft language that had been prepared by staff. See Exhibit p. 4. Those letters are discussed below.

Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

FORCED ELECTIONS

One of the questions presented in the tentative recommendation is whether the law should allow a decedent to use a no contest clause to create a “forced election.” That is, to force a beneficiary to choose between accepting whatever gift is offered under the decedent’s estate plan or, in the alternative, forfeiting that gift and filing a court action asserting either a creditor’s claim or a claim of ownership of purported estate assets.

For example: Transferor and her second husband own \$2 million in assets between them, but cannot agree on precisely how much is the husband’s share of community property. Transferor is confident that her husband’s share is no more than \$250,000. She leaves \$500,000 to her husband in her estate plan, and the remainder to her children from her first marriage. She includes a no contest clause providing that her surviving spouse forfeits the \$500,000 if he files a court action claiming ownership of any part of the remainder of the estate.

After her death, the surviving husband must decide whether to (a) take the \$500,000 and forego any community property claim in the other property, or (b) forfeit the \$500,000 and litigate to determine his community property share of the estate. In the first case, he receives \$500,000. In the latter case he receives whatever the court determines is his community property share of the estate, which could be more or less than \$500,000, minus his litigation costs. In neither case can he receive both the \$500,000 and the asserted community property share. The point of the no contest clause is to prevent that sort of “double-dipping.”

A marital forced election can be very useful, as it allows a transferor to avoid complex property characterization litigation after death, by offering a gift that is generous enough to deter the filing of such litigation. If the gift is clearly more than the beneficiary would receive as a result of litigation, then all parties benefit. The beneficiary is made whole (or more than whole) and the estate is not depleted (or delayed in its administration) by litigation.

However, a forced election can also be perceived as unfairly coercive, presenting an all-or-nothing choice when bargaining is no longer possible. That may be especially problematic in a marital relationship where the need for a

surviving spouse to make a rational choice may be complicated by grief, age, and the emotional complexity of intimate relationships.

At the August 2007 meeting, the Commission decided that the proposed law should not preclude the use of forced elections. The staff was directed to prepare language that would preserve that estate planning option.

At the time, the representative of TEXCOM cautioned that it would be very difficult to implement that decision without also reintroducing a problematic degree of uncertainty into the operation of a no contest clause. One of the goals of the proposed law is to make the operation of a no contest clause so certain as to obviate the need for declaratory relief to construe the application of a no contest clause.

TEXCOM was correct. The concepts of “creditor claim” and “property ownership claim” are potentially very broad. A no contest clause that is enforceable in response to such claims could have consequences that the transferor never intended. That problem is discussed below.

Existing Law

Existing Section 21305(a) provides for enforcement of a no contest clause against a creditor claim or property ownership dispute, so long as the clause “expressly identifies” such application:

21305. (a) For instruments executed on or after January 1, 2001, the following actions do not constitute a contest unless expressly identified in the no contest clause as a violation of the clause:

- (1) The filing of a creditor’s claim or prosecution of an action based upon it.
- (2) An action or proceeding to determine the character, title, or ownership of property.

...

The most conservative approach that the Commission could take to the forced election issue would be to continue language along those lines. **That possibility should be kept in mind.**

However, there are a number of identified ways in which such broad language could invite unintended application of a no contest clause. That should be minimized to the extent possible.

Unintended Application Involving Statutory Compensation

There are a number of provisions of the Probate Code that expressly authorize reimbursement of expenses or compensation for services. Those

provisions implement important public policies relating to the winding up of a decedent's affairs.

If a person makes a claim for payment under one of those provisions, it might be construed as a "creditor claim" against the estate, triggering a broadly worded no contest clause. That would probably not be the transferor's intended result. Nor would it be good policy.

Examples are discussed below.

Funeral and Last Illness Expenses

Under Section 11421, a person may claim reimbursement for funeral expenses and for expenses arising from the transferor's final illness.

The transferor will not know in advance the magnitude of those expenses and may not know which beneficiary will pay them. It therefore seems unlikely that a transferor would intend for a no contest clause to apply to a claim for reimbursement of such expenses.

In addition to the unlikelihood that such a result would be intended, it would also be against public policy. The law encourages beneficiaries to undertake those sorts of responsibilities by guaranteeing that advanced funds will be reimbursed. Allowing a no contest clause to penalize a beneficiary in those circumstances would defeat the purpose of the reimbursement statute.

Fiduciary Compensation

A person who serves as a personal representative, attorney for a personal representative, or trustee is entitled to compensation for services and costs associated with estate administration. See Sections 10800-10850, 15680-15688.

It is socially useful for family members and other beneficiaries to undertake those duties. The law expressly provides for compensation. A claim for reimbursement of estate administration costs is given the highest priority with respect to other claims against an estate. Section 11420.

Application of a no contest clause to a claim for reimbursement would defeat public policy by discouraging beneficiaries from taking responsibility for estate administration.

Unintended Application Involving Family Protections

There are also provisions in the Probate Code that provide for the support of the transferor's dependents during estate administration. Those provisions serve

important public policies. Again, it is unlikely that a transferor has these matters in mind when drafting a no contest clause.

Family Allowance

Sections 6540-6545 provide for a “family allowance.” Under Section 6540, certain dependent family members of the transferor may petition the court for payments from the estate “as necessary for their maintenance according to their circumstances during administration of the estate.”

The chief purpose of the statute granting family allowances during settlement of the estate is to place the welfare of the decedent’s family above the interests of creditors, heirs, legatees, and devisees. Payment of a family allowance is given priority over virtually every other estate debt. A family allowance eases the economic hardship suffered by those whom the decedent either had a duty to support or actually provided support for, during the period from the decedent’s death until distribution of the estate. Thus, a family allowance is strongly favored in the law.

24 Cal. Jur. 3d *Decedents’ Estates* § 341 (2007) (citations omitted).

Given the important policy served by the family allowance (support of dependents during the period of estate administration), a no contest clause should not penalize a beneficiary who petitions for a family allowance. What’s more, it seems very unlikely that a transferor would intend a no contest clause to have that sort of application.

Family Protection (Including the “Probate Homestead”)

The surviving spouse and minor children of a decedent may remain in possession of the family dwelling, clothes, furniture, and property that is exempt from the enforcement of a money judgment, until 60 days after the preparation of the inventory of the transferor’s property. That time period can be extended on petition. See Section 6500. The court also has discretion to set aside property that is exempt from enforcement of a money judgment, other than the family dwelling, for the surviving spouse or minor children. See Section 6510.

In addition, a court may set aside a dwelling to serve as a “probate homestead” for the transferor’s surviving spouse or minor children. See Section 6520. The probate homestead is of fixed duration (which cannot exceed the lifetime of the surviving spouse, or time during which a dependent child is a minor). See Section 6524. The probate homestead right is superior to the rights of

other heirs and creditors. They take subject to it (in effect as remainder holders).
Id.

A petition relating to those protections should not trigger a no contest clause. Those protections serve important public policies (preserving property necessary for the support of the transferor's dependents during estate administration). Nor is it likely that a transferor intends a no contest clause to apply to those matters.

Unintended Application to Unforeseen Debts

Another problem with a forced election can arise if the election applies to a creditor claim for a debt that the transferor did not anticipate at the time of drafting the no contest clause. In most cases, a transferor would not intend to create a forced election with regard to a debt that hasn't yet arisen.

Examples of unanticipated debts are discussed briefly below.

Later Arising Contract

If a transferor enters into a contract after executing an estate plan, it will often be the case that the debt arising under the contract was not anticipated in drafting the estate plan. This is especially likely if the transferor's death or incapacity follows shortly after formation of the contract.

For example, suppose that a transferor executes an estate plan that leaves \$50,000 to each of his four grandchildren. Five years later he contracts with his granddaughter to construct an addition to his house, in exchange for a payment of \$50,000. The addition is constructed pursuant to contract, but before the transferor can pay for the work, he dies. If a claim for payment of the debt would trigger a no contest clause, the granddaughter would be effectively disinherited. It seems unlikely that the transferor would have intended that result.

Later Arising Tort Claim

Suppose a transferor is driving negligently and gets into an accident. In the accident, the transferor and the transferor's grandchild are killed. The grandchild's parents are beneficiaries of the transferor's estate, which includes a no contest clause. The parents would like to bring a wrongful death action against the transferor's estate, expecting that the judgment would be paid by the transferor's insurance company. Should that claim against the estate trigger the no contest clause?

A transferor could not have anticipated that situation. Nor is there any good reason to deter a claim that will ultimately be paid by insurance. Under those

facts, a forced election would seem to work to defeat the transferor's intention of making a gift to the parents of the deceased grandchild.

Wage Claim

Section 11421 provides for the payment of "wage claims" from a transferor's estate. A wage claim is defined as a claim for up to \$2,000 by an employee of the transferor, for work provided in the 90 days prior to the transferor's death.

It seems very unlikely that the transferor would expect an employee's inheritance to substitute for wages that would have been paid in the normal course of events if the transferor had not died.

Unintended Application to Property Ownership Claims

Under existing law, a no contest clause may be enforced against an "action or proceeding to determine the character, title, or ownership of property" provided that such a contest is "expressly identified in the no contest clause as a violation of the clause[.]" Section 21305(a)(2).

There are a number of situations in which a property ownership dispute could lead to unintended application of a no contest clause. Examples are discussed below.

Joint Accounts

It is fairly common for an elderly person to place funds in a joint account between that person and a relative or friend. In some cases, the intention is to make a gift of whatever funds remain in the account on the transferor's death. In other cases, the account is created solely as a convenience. The other person named on the account is merely helping the elderly person to pay bills. No gift is intended.

The transferor's intentions may be in dispute. The transferor's trustee or personal representative may petition to have the funds in the account retrieved into the estate. See Section 850, providing for a return of funds.

If the person whose name is on the account opposes such a petition, that opposition could be a property ownership claim that is sufficient to trigger a no contest clause. If the transferor did intend a gift, then the no contest clause would defeat that intention.

Action Inconsistent with Instrument

There may be instances where a transferor intends one thing when executing an estate planning instrument and then clearly changes her mind and disposes of property in a way that contradicts the instrument.

For example, a trust expressly states that Blackacre is part of the trust estate and will be transferred to the transferor's son on her death. Before death, she marries and decides to retitle Blackacre as a joint tenancy between herself and her husband. She forgets to amend her trust. On her death, the trustee files a petition to recover Blackacre into the trust, for transfer to the transferor's son. If the surviving husband objects, his "claim of ownership" could trigger a no contest clause.

General Gift of "My Property"

If an instrument provides for a general gift of "all of my property" or "the remainder of my property," it is unclear what property would fall within the gift. The courts have held that a reference to "my property" is not intended to include the property of another. Therefore, it would not include community property of the transferor's spouse.

In order to determine the content of such a gift, it is necessary to determine which property belongs to the transferor and which property belongs to the surviving spouse. The surviving spouse can participate in that determination without violating a no contest clause. Such participation helps to *effectuate* the transferor's intentions, rather than impair them. See e.g., *Estate of Kazian*, 59 Cal. App. 3d 797, 130 Cal. Rptr. 908 (1976).

Nonetheless, an instrument may be drafted carelessly, and a beneficiary may not be able to tell with certainty which property is claimed to belong to the transferor (and is therefore protected by a no contest clause) and which property is not intended to encompass any of the surviving spouse's community property (in which case the surviving spouse's participation in the property characterization would not cause forfeiture under a no contest clause). That could be a significant source of uncertainty.

NARROWED LANGUAGE

The primary justification for enforcement of a no contest clause is that it effectuates the transferor's intent. The law should respect a person's ability to control the use and disposition of the person's own property. That includes the

ability to make a gift, either during life or on death. An owner may place conditions on a donative transfer of property, so long as the condition imposed is not illegal or otherwise against public policy. See *Estate of Kitchen*, 192 Cal. 384, 388-89, 220 P. 301 (1923).

That rationale does not justify the *unintended* application of a no contest clause. To the contrary, because forfeiture is such a harsh penalty, it is disfavored as a matter of policy. Accordingly, a no contest clause should be applied conservatively, so as not to extend the scope of application beyond what was intended: “Because a no contest clause results in a forfeiture ... a court is required to strictly construe it and may not extend it beyond what was plainly the testator’s intent.” *George v. Burch*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994). See also Section 21304 (no contest clause to be strictly construed).

With those policies in mind, the staff attempted to draft language that would continue the substance of existing law on forced elections, while narrowing the scope for uncertainty and unintended effect.

Discussion Drafts

The staff prepared several discussion drafts that were shared informally with the liaisons of TEXCOM. It was made clear that the drafts were prepared by the staff as discussion documents only and did not reflect any decision of the Commission itself.

In developing the successive drafts, a number of refinements were developed:

- (1) **A no contest clause would not apply to a creditor claim for a debt that arises after the date of execution of the no contest clause.** That would precluded unintended application of the no contest clause to unforeseen debts (including funeral expenses, family support, etc.).
- (2) **A no contest clause would not apply to a creditor claim unless the instrument identifies the debt specifically and states that the gift made under the estate plan is intended as satisfaction of the debt.** That degree of specificity should preclude all scope for unintended application. There are already standard practice forms that can be used to prepare such a clause. See 1 Cal. Transactions Forms, *Estate Planning* § 6:80.
- (3) **Application of a no contest clause to a property ownership claim would require that the clause itself state such application.** That is existing law and should be continued.
- (4) **In order for a no contest clause to apply to a property ownership claim, the instrument must either expressly declare that the claimed property belongs to the transferor or must make a**

specific gift of the claimed property. In the latter case, it is clear that the transferor is asserting dispositional control of the asset. This change would help to avoid the uncertainty as to whether a general reference to “my property” is intended to preclude a claim of ownership by a beneficiary.

- (5) **A no contest clause should only apply to a community property claim.** TEXCOM suggests that, in practice, nearly all forced elections involve disputes over community property characterization. It would be cleaner to limit a no contest clause to that ground, so as to avoid unintended results in other areas.

The staff prepared language implementing those principles and provided it to TEXCOM for consideration at a meeting of the full committee. In relevant part, the draft provided as follows:

21330. ...

(c) “Community property dispute” means a pleading that asserts a community property interest in: (1) property that is specifically identified in a protected instrument as the transferor’s separate property or the transferor’s share of community property, or (2) property that would be given as a specific gift under a protected instrument.

...

21333. A no contest clause may only be enforced against the following types of contests:

...

(b) A community property dispute, if the no contest clause expressly states that it applies to a community property dispute.

(c) The filing of a creditor’s claim or prosecution of an action based on it, if both of the following conditions are satisfied:

(1) The debt claimed by the creditor existed before the execution of the instrument containing the no contest clause.

(2) A protected instrument specifically identifies the debt claimed by the creditor and expressly states that the gift given to the creditor under the instrument is in satisfaction of the debt.

TEXCOM Response

TEXCOM opposed the proposed language. See Exhibit pp. 4-5. Their comments are discussed below.

Creditor Claim

TEXCOM voted unanimously, with one abstention, against enforcement of a no contest clause in response to a creditor claim. The letter reporting that vote does not explain the reason for the opposition. See Exhibit p. 5.

The staff does not understand TEXCOM's position. The proposed language would prevent unintended application of a forced election to a creditor claim in all of the circumstances described above.

The staff believes that the draft language achieves the Commission's goal. It continues the ability to create a forced election as to a creditor claim, but does so with sufficient statutory precision to prevent unintended application. In that regard, it is a significant improvement over existing law, which requires only that a no contest clause specify generally that it is intended to apply to "the filing of a creditor's claim or prosecution of an action based upon it." See Section 21305(a)(1).

The only objection that the staff anticipates is that the draft language is *too* restrictive. Transferors should be able to use a no contest clause to deter all creditor claims, without specifically identifying them and without regard for whether they exist at the time that the clause is executed.

The staff sees a good argument that such broad application is against public policy. It invites a host of unintended forfeitures, some involving statutory rights and protections.

The staff has also heard informally that it is very rare that a forced election is drafted to cover a creditor claim. Even if that is so, it is not an argument for eliminating the option. The option might still be very important in unusual circumstances.

What's more, the staff is aware of two recent no contest clause cases that involved creditor claims. See *Zwirn v. Schweizer*, 134 Cal. App. 4th 1153 (2005) (attempt to enforce contract to make will was creditor claim); *Colburn v. Northern Trust Company*, 151 Cal. App. 4th 439, 59 Cal. Rptr. 3d 828 (2007) (enforcement of support judgment was creditor claim). The existence of two recent appeals on point suggests that there are more than just a handful of creditor claim cases.

Community Property Claim

TEXCOM unanimously opposed proposed Section 21330(c), which would have permitted enforcement of a no contest clause in response to a "community property dispute." See Exhibit p. 4.

However, the opposition seems to have been divided into two camps. An unspecified majority of the members opposed "allowing the settlor to enforce a community property election through a no contest clause." See Exhibit p. 4. The

remainder opposed because “they wanted to expand the section to cover all property disputes.” *Id.*

The staff believes that this split is indicative of the differing views within the estate planning community as a whole. Some planners believe that forced elections should be preserved. They would resist any narrowing of the scope of enforcement of a no contest clause in the context of forced elections. Others oppose any use of a no contest clause to create a forced election, either on principle or because of the practical problems of the sort described above. They would like forced elections to be sharply narrowed or abolished.

RECOMMENDATION

The staff has put considerable thought and effort into attempting to devise language that would preserve the forced election as a planning tool without continuing the problems that can arise under the broad language of existing Section 21305(a). The staff received considerable assistance from the representatives of TEXCOM, whose insights were very helpful in identifying potential pitfalls.

The staff believes that the proposed language on creditor’s claims is a major improvement over existing law. It provides a rule that is clear and workable and that forecloses many avenues that could lead to unintended forfeiture. **The staff recommends that language.**

The treatment of property ownership claims is a much tougher problem. Apparently, part of TEXCOM’s opposition to the proposed language could be eliminated if the provision were expanded to apply to *any* property ownership claim, rather than being limited to a community property ownership claim. That would continue the scope of existing law. Such a change might well harden the opposition of the majority of TEXCOM. However, it is not clear that any language we could come up with would meet with their approval. The opposition of the majority seems to be opposition to any use of a no contest clause to create a forced election.

In order to more closely continue existing law, the staff recommends that the proposed language be broadened to encompass any property ownership claim, as follows:

21330. ...

(c) “Property ownership claim” means a pleading that asserts ownership of property that is specifically identified in a protected

instrument as the transferor's property, or that would be given as a specific gift under a protected instrument.

21333. A no contest clause may only be enforced against the following types of contests:

...
(b) A property ownership claim, if the no contest clause expressly states that it applies to a property ownership claim.
...

As drafted, the language would include the proposed requirement that the disputed property either be expressly stated to belong to the transferor or be the object of a specific gift. That would eliminate one source of uncertainty about whether the no contest clause is intended to create a forced election.

The staff believes that there would be three objections to that language:

(1) It is not foolproof. Even with the restrictions, there could be an unintended application of a no contest clause in response to a property ownership claim. See, e.g., "Joint Accounts" and "Action Inconsistent with Instrument" above.

That is correct. However, the staff does not see a way to restrict the scope for such errors without creating a commensurate limitation in the utility of the forced election. The more hemmed in the option becomes, the less useful it would be.

Although the proposed language is no panacea, it would be an improvement over existing law.

(2) Requiring that the instrument expressly claim ownership of specific property could be problematic if the property is sold or exchanged. Suppose that a trust expressly claims Blackacre as the transferor's separate property. The transferor's surviving spouse believes that she has a community property interest in Blackacre. Before death, the transferor sells Blackacre. The proceeds of sale fall into a general gift. If the surviving spouse claims a community property interest in those proceeds, would she be subject to a no contest clause?

Such complications could arise. The staff suspects that the court would trace the proceeds and treat them as having been claimed as the transferor's separate property (in which case the forced election would apply to a claim of ownership of that money). However, it is quite possible that a court might reach a different result. The operation of the no contest clause would turn on that question.

The staff sees three ways to address that problem. (a) Do nothing, and let the courts sort it out. (b) Delete the language requiring a claim of ownership or a specific gift of the disputed property. (c) Restore declaratory relief on a limited basis, as discussed immediately below. **The staff favors the third approach.**

(3) Preservation of existing law, even with the proposed refinements, will preserve uncertainty as to the operation of a no contest clause as applied to a property ownership claim. That uncertainty would be a significant problem because the proposed law would eliminate the declaratory relief remedy.

That is true. It is not possible to preserve the exact situation under existing law if declaratory relief is eliminated. Beneficiaries would face the sorts of uncertainty that arise under the existing statute without any mechanism for judicial resolution of the uncertainty.

Some have suggested adding the probable cause exception to forced elections, to ameliorate the consequences of uncertainty. That would not be workable. In the most common use of a forced election, the transferor *knows* that a beneficiary has an independent legal right that could be pursued. That is the point of creating the forced election, to compel a choice between taking under the estate or under the independent legal right. If a forced election could be avoided simply by showing that the beneficiary has probable cause to pursue an independent right, it would be avoided in virtually all cases where a forced election is useful.

Another option would be to preserve declaratory relief, *but only for questions involving forced elections*. Thus, Section 21320 could be revised along the following lines:

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7, Part 8 (commencing with Section 19000) of Division 9, ~~an action pursuant to Section 21305,~~ and an action under Part 7 (commencing with Section 21700) of Division 11, would be a contest within the terms of the no contest clause under subdivision (b) or (c) of Section 21333.

(b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a).

(c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause under subdivision (b) or (c) of Section 21333 may not be

made if a determination of the merits of the motion, petition, or other act by the beneficiary is required.

(d) ~~A determination of whether Section 21306 or 21307 would apply in a particular case a motion, petition, or other act by the beneficiary would be a contest within the terms of the no contest clause under subdivision (a) of Section 21333 may not be made under this section.~~

Preservation of declaratory relief would undercut a major policy goal of the proposed law: to eliminate the need for declaratory relief, which many attorneys feel is being overused and adding unnecessary litigation expenses. See, e.g., Exhibit pp. 1-3.

Even with a sharply narrowed scope, declaratory relief might be overused. However, the staff feels that the narrowed scope would cause a significant reduction in the magnitude of the problem. Although more modest than what the Commission originally proposed (the complete elimination of declaratory relief), it would still be a significant improvement over existing law.

The staff recommends that the property ownership provisions be approved as drafted and that the declaratory relief provisions be preserved but narrowed to govern only forced elections.

PROBABLE CAUSE

The Commission has decided that there should be a probable cause exception to the enforcement of a no contest clause against a “direct contest.” However, the Commission has not yet settled on an acceptable definition of “probable cause” to bring a direct contest. That issue is discussed below.

Existing Law

Existing Section 21306(b) defines “reasonable cause” to bring a contest as follows:

“Reasonable cause” is defined for the purposes of this section to mean that the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery.

At the August meeting, the Commission directed the staff to develop a standard of probable cause that uses the Section 21306 language as a starting

point. However, the intent should be to develop a standard that would require a reasonable belief that the chance of success of the contest is greater than a mere possibility (though success need not be “more likely than not”). See Minutes (August 2007), p. 8.

The staff has two concerns about the language used in Section 21306. First, it appears to focus exclusively on the likelihood of proving *factual contentions*, without regard for whether those contentions, if proven, would support a legal ground on which relief could be granted. Second, the only case that has interpreted the language equated it with the standard for malicious prosecution (i.e., “whether any reasonable attorney would have thought the claim tenable”). See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). That strikes the staff as too low a standard for this context.

Proposed Language

The staff proposes the following language as a way to accommodate the Commission’s instructions and the staff’s concerns:

21333. ... (b) For the purposes of this section, a contestant has probable cause to bring a contest if the facts known to the contestant, at the time of filing the contest, would cause a reasonable attorney to believe that there is a reasonable likelihood that relief will be granted after an opportunity for further investigation or discovery.

Comment. ... Subdivision (b) provides the standard for determining whether there is probable cause to bring a direct contest. The term “reasonable likelihood” has been interpreted to mean “something less than ‘more probable than not,’” and “something more than merely ‘possible.’” See *Alvarez v. Superior Ct.*, 2007 DJDAR 13088, n. 4 (construing Penal Code § 938.1); *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033).

That language is largely derived from Section 21306, with two important differences, aimed at addressing the staff’s concerns.

Sufficiency of Legal Grounds

The proposed language would not focus exclusively on the proof of factual contentions. It would also require that a *reasonable attorney*, apprised of the same facts as the contestant, would believe that there is a reasonable likelihood that *relief would be granted*. For an attorney to have such a belief, there would need to be legal grounds for the granting of the requested relief, and there would need to

be a belief that the facts are probably sufficient to establish the legal grounds for relief.

Likelihood of Success

One of the staff's concerns with existing law is that it sets a very low threshold. The staff has recommended that the likelihood should be more than a mere possibility of success. At the same time, it would seem to be too strict to require that probable cause mean that it is more likely than not that a claim will be successful.

At the August meeting, the staff indicated that it would look for a way to establish a standard that would mean something less than "more probable than not," but more than merely "possible."

Fortuitously, the staff found a recent case that stated exactly that standard in construing the term "reasonable likelihood." See *Alvarez v. Superior Ct.*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007). The case interpreted the meaning of Penal Code Section 938.1(b), which provides for the sealing of a trial transcript in a criminal case if there is a "reasonable likelihood" that making the transcript public would prejudice the defendant. The *Alvarez* court also points to another line of cases that have interpreted the same term in the same way.

Those cases construe the meaning of "reasonable likelihood" in the context of Penal Code Section 1033, which authorizes a change of venue where there is a reasonable likelihood that a defendant will not receive a fair and impartial trial in the county where the trial is set. In that context, the phrase "reasonable likelihood" "means something less than 'more probable than not,'" and "something more than merely 'possible.'" See, e.g., *People v. Jenkins*, 22 Cal. 4th 900, 943, 997 P.2d 1044 (2000); *People v. Bonin*, 46 Cal. 3d 659, 673, 250 Cal. Rptr. 687 (1988).

The contexts in which those cases construe the term are not analogous to the context in which we would use the term. However, the staff found no other context in which the term has been construed by the courts.

If the proposed law uses the term, and the Commission's Comment adopts the prevailing judicial interpretation of the term expressly, that should be controlling. The Comment will be entitled to great weight in construing the statute. See *2006-2007 Annual Report*, 36 Cal. L. Revision Comm'n Reports 1, 18-24 (2006) & sources cited therein.

TEXCOM Response

The staff believes that TEXCOM supports the proposed definition of “probable cause.” Its letter focused only on points where the group opposed the draft language. There was no objection to the probable cause standard.

DECLARATORY RELIEF

Charles Collier writes to urge the Commission to delete the declaratory relief procedure. Exhibit pp. 1-3. The staff generally agrees, with the exception for forced elections discussed above.

OTHER ISSUES

This memorandum discusses the most important and difficult problems remaining with the proposed law. Once those matters are settled, the staff will prepare a draft recommendation for Commission review and approval. That draft will also address a handful of other minor issues that have not yet been resolved.

Respectfully submitted,

Brian Hebert
Executive Secretary

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Law Revision Commission
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September 6, 2007

File: _____

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94303-4739

Re: Study No. L-637-- Revision of the No Contest Clause Statute

Dear Commissioners:

This letter is written in response to Comments on Tentative Recommendations set forth in Memorandum 2007-29 dated August 13, 2007.

This response is limited to the issue of the declaratory relief provisions of the existing statute.

In Memorandum 2005-47, defining the scope of the study, at page 3, there is a discussion of the declaratory relief provisions of the statute noting that the appellate decisions involving that declaratory relief are becoming very common and that some practitioners believe it's almost malpractice not to request declaratory relief on behalf of a client. At pages 5 and 6 of that same memorandum, there is discussion of possible ways to either modify or eliminate the declaratory relief provisions and reference is made thereto.

In Memorandum 2006-42, at page 25, reference is made to the fact that prudent practitioners routinely file petitions for declaratory relief under Probate Code Section 21320 and that this results in two levels of litigation when instruments contain a no contest clause namely litigating the declaratory relief petition and litigating the substantive issues. It also notes that there may be more than one declaratory relief petition filed if new evidence or potential claims merge.

The first supplement to Memorandum 2006-42 contains the email letter from Robert Temmerman, Jr., suggesting that he is intrigued by the possibility of simply repealing the declaratory relief provisions of the existing law.

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In the second supplement to Memorandum 2006-42 is a letter from the California Judges Association referring to the declaratory relief provisions. It states "adjudication of these petitions has become a substantial burden on the courts. It is not merely the volume of the petitions that is the problem, but the difficulty and analysis that must be applied to them. In actual litigation, the court determines the facts and applies the law to those facts. This is often difficult. However, in ruling on the declaratory relief petitions, the court must try to consider every possible permutation of the facts that may be adduced under the petition. . . . This is often very difficult and time consuming and delays the resolution of the underlying conflicts."

In Memorandum 2006-45, the staff, at page 9 and 10, discussed possible repeal of the declaratory relief provisions and noted it does provide a safe harbor against forfeitures in cases where the no contest clause or the law is unclear in its application.

The first supplement to Memorandum 2006-45, attaches the memorandum from TEXCOM. Its memorandum under II refers to the "20320 problem" and enumerates a number of issues that relate to that problem and "the delay, procedural nightmares and costs" involved in those proceedings. The TEXCOM memo stated that "any solution to the '21320 problem' must include repeal of section 21320."

The tentative Recommendation dated April 2007 states that on pages 22-23:

"By limiting the scope of application of a no contest clause to a carefully defined class of 'direct contests,' most of the uncertainty arises from existing law would be eliminated. Consequently there should be little need for pre-trial declaratory relief."

"The proposed law would delete the declaratory relief provisions that would result in significant savings to the state's heirs in the courts."

In Memorandum 2007-29 there is a discussion of the possible elimination of the declaratory relief procedure on pages 22-24. There were three comments received suggesting that elimination of the declaratory relief provision was not appropriate. Estate of Friedman, 100 Cal.App.3rd 810, 161 Cal.Rptr. 311 (1979) was referred to where a declaratory relief action was brought in connection with the interpretation of a will. That was obviously under general civil procedures and before enactment of the declaratory relief provision in the no contest clause statute. The staff adds "in light of the comments that we have received, the staff believes that the declaratory relief procedure should be preserved for now." It notes that with the simplification of the law it creates greater certainty as to the scope of application of the no contest clause and its use should drop significantly.

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The mere fact that a declaratory relief provision is part of the no contest clause statute is a direct invitation to always use it as a preliminary step and not rely simply on the probable cause safeguard. Generally, the rules applicable to civil proceedings apply in the probate court except as otherwise specifically provided in the Probate Code. See, for example, Probate Code Section 800. Elimination of the declaratory relief provisions in this no contest clause statute would remove the temptation to file a declaratory relief petition whenever a no contest clause was involved.

The various memoranda dealing with the no contest clause so far as this writer has been able to ascertain, do not discuss the availability of the declaratory relief procedure in other jurisdictions. It is believed that few, if any, other jurisdictions have a declaratory relief procedure and that the no contest clause in those jurisdictions works quite well based on the probable cause criteria alone. The Uniform Probate Code, for example, in Section 2-517 states that a no contest clause is unenforceable if probable cause exists for instituting proceedings.

This writer believes that the declaratory relief provisions are somewhat unique to California and that in most jurisdictions the test is simply whether there is probable cause. Since probable cause is being further defined under proposed statutory changes and since direct contests are very specific, the need for a continuing declaratory relief provision appears to be minimal. It is suggested it be deleted entirely even if that would not preclude such a petition under general law. Such a petition would probably be extremely rare if not part of the Probate Code itself.

I hope this is helpful to the Commission.

Sincerely,



Charles A. Collier, Jr.

CAC:pr

NOTES AND THOUGHTS
FROM TEXCOM NO CONTEST CLAUSE DISCUSSION
SEPTEMBER 30, 2007

To: Brian Hebert

From: Neil F. Horton

cc: CLRC Committee and Shirley Kovar

This memorandum summarizes my notes and thoughts on what happened during Texcom's discussion of the September 25 draft of the proposed no contest clause statute. We discussed only those sections on which controversy exists. Texcom also recommended a few drafting changes to the September 25 draft. The memorandum indicates suggested new language in **bold** and deletions in *italics*.

1. 21330(b)(5): Disqualification of a beneficiary under **Part 3.5 (commencing with Section 21350) of Division 11.**

Vote: Even if the change in language were adopted, Texcom rejected the concept of no contest clauses applying to a direct contest on the ground that the beneficiary is a disqualified person by a vote of 9 in favor, 20 opposed, and 2 abstaining. The comments reflected Texcom's apprehension over the broad definition of care custodian in Prob. C. §21350(c).

2. 21330(c): "Community property **contest**" means a pleading **filed with the court** that asserts a community property interest in: (1) property that is specifically identified in a protected instrument as the transferor's separate property or the transferor's share of community property, or (2) (*property that would be given as*) a specific gift under a protected instrument.

Vote: Texcom unanimously opposed §21330(c)(1). In addition to the two specific comments below, the no votes came from two opposing views. What I believe to be a majority opposed because they oppose allowing a settlor to enforce a community property election through a no contest clause. Others opposed because they wanted to expand the section to cover all property disputes. We failed to hold separate votes to distinguish the two camps.

My notes reflect two comments, on which I comment further.

Comments:

Member: The proposal does not address the issue that will arise if, after signing the instrument specifically identifying property as his separate or community, the settlor sells or exchanges one or more of those properties. Specifically identifying the assets in the instrument in many, if not most, cases will not provide the surviving spouse with the information necessary to make an informed choice.

See Prob. C. §21131 et. seq., dealing with ademption. If ademption occurs, should the fiduciary be required to specifically identify the proceeds or the replacement property and, if so, when? In doing so, should the fiduciary owe a duty of impartiality to the surviving spouse as well as to the proposed beneficiary of the gift? Should the surviving spouse be able to object to the fiduciary's determination of the amount of the proceeds or the identity of the exchanged property without being deemed to be subject to a no contest clause?

Member: What if the surviving spouse contests and then quickly dismisses the action? Under the common law governing no contest clauses, the forfeiture occurs. Because the community property contest has no exception for probable cause, because declaratory relief is not available, and because no other ameliorative exception exists, the new law could apply rigidly and unfairly.

What about relief similar to that available under CCP §473(b)?

3. 21330(e): "Pleading" means a petition, complaint, cross-complaint, objection, answer or response **filed with the court.**

Vote: Texcom approved the section as amended by a vote of 28 yes, 2 no, and 1 abstention.

4. 21330(f), defining protected instrument.

Vote: Texcom voted against the definition of protected instrument by a vote of 9 (?) yes, 20 no, and 2 abstentions. I am not clear on the number of ayes. Again, arguments were made against the proposal from opposing sides. One member opposed allowing an instrument to incorporate a no contest clause by "republication" as unduly expanding the scope of no contest clauses. Another member opposed (f)(3) because it would make it more difficult to have a no contest clause apply to a client's integrated estate plan.

5. 21333(c), allowing no contest clauses to be enforced against creditor's claims.

Vote: Texcom voted unanimously, with 1 abstention, against allowing no contest clauses to be enforced against a creditor's claim. One member commented that if the statute allows no contest clauses to be enforced against a creditor's claim, the statute should allow an exception if the creditor had probable cause for filing the claim.

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